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DEFINITION AND NATURE OF INTERNATIONAL LAW

This article will be devoted to a discussion of the nature and definition of international law, and will be an application to state conduct of the reasoning already applied to individual conduct. It has already been pointed out that law, when classified with respect to the external factors determining conduct, may be divided into the jural conception of the conduct of bodies which are not subject to the restraints of external political power, and the jural conception of the conduct of bodies which are so subject. Independent states have also been distinguished and described as the only bodies in the world whose conduct is not subject to external political power. International law, therefore, is that branch of law which relates to the conduct of independent states. In the previous article we have pointed out that independent states are living organisms having certain inherent powers and unrestrained by any exterior political power. The unrestrained exercise of this power would result in anarchy. Each state is in fact restrained by certain factors, and the exercise of restrained power by a state results in an appreciable amount of international order. Our task now is to discover what those restraints are and how they may be described and their operation known. It is important for the student of international law clearly to keep in mind that we start with unrestrained power of organisms as a fact, and study the restraints which exist on the exercise of those powers.

 Substantially Chapter Three of a treatise on International Law now in course of publication. Section numbers, headings and cross references omitted. Chapter One on "The Definition and Nature of Law" appeared in the November number of the Columbia Law Review. Chapter Two of the treatise deals with the facts of international life.

A state has an interest in an object, just as an individual has, when any change in that object will affect the state. Since, however, the activity of a state is confined almost entirely within its own limits by the facts of international life, it follows that the interests of a state will be few in number. Those which may exist are enumerated in tabular form in the note.[1] An individual interest will be subordinate to the collective interest of the state. Thus, an individual has an interest in his own life; the state has an interest in its preservation, and it is better that the state should be preserved and one or more individuals perish than that a few individuals should survive and the state should perish. The extent to which state or individual interests prevail varies in different communities and in the same community at different times, depending on various factors which are immaterial to the present discussion. The interest of a state is unprotected by external political power, but is protected by the factors determining independent state conduct which will next be discussed.

The factors determining the conduct of an independent state are easily described, and a brief reference to them will be sufficient. There is no political authority external to an independent state, consequently no power which can afford redress for damage to a state interest, determine a dispute between two states, or coerce an independent state to perform any particular act. States do, however, observe habitual and uniform conduct in many particulars, to which they are influenced by certain factors, to understand which we must bear in mind that although states are in fact organisms, they are operated by men.[2] No state can

[1] A state will have the following interests:
(1) An interest in itself, its territory, form of government, municipal law.
(2) An interest in its officials, when they venture forth from its jurisdiction, which will be—
(*a*) On the open sea,
(*b*) Within jurisdiction of another state,
(*c*) In jurisdiction of no state.
(3) An interest in its members beyond its borders,
(*a*) On the open sea,
(*b*) Within jurisdiction of another state,
(*c*) In jurisdiction of no state.
(4 An interest in another state.
(*a*) Another independent state,
(*b*) A dependent state.
(5) An interest in the open sea and in territory not subject to the jurisdiction of any other state.
(6) An interest in the maritime belt.

[2] For the purposes of this discussion the distinction between state and government is immaterial and the word "state" will be understood to include the government unless otherwise indicated by the context.

act without some one or more human wills determining that act. The behavior of the state will therefore be subject to the same principles as govern the conduct of men, because no man, upon assuming a state office, can divest himself of human attributes and become an impersonal machine. An independent state will be governed in its conduct by—(A) Self-interest, (B) Inherent prejudice, (C) International public opinion, (D) Custom or precedent, (E) Pressure from one or more other states, apart from political power. A state act will be influenced in any given case by these factors in varying degrees, and they may or may not act together. Self-interest will in some cases control and the others will be defied. The force of habit and custom is so great in human affairs that a state will endeavor to show that what is demanded by self-interest is in accordance with precedent and international public opinion. These factors will be referred to, for convenience, as international factors determining the conduct of independent states.[3] They are of varying force and the views of most of the writers on international law are colored by the emphasis placed on a particular factor to the exclusion of the others.

The principles of ethics as influencing conduct are excluded from this discussion. These principles, so far as they may be determined and agreed upon are solely the result of a more advanced culture and regard for the interest of others than is common to the average member of the community and are therefore representative in a small part of public opinion. The operation of these principles is too weak, therefore, to justify the inclusion of them in the factors which actually operate with effect in international life.[4] The influence of ethics is naturally very strong in theory, as the writers represent the best element in the community, and accordingly we find most of them over-emphasizing the ethical aspect of the subject and coloring their statements of international law with this view so strongly that they generally leave an entirely erroneous impression. There is no universal standard of justice,[5] consequently the opinion of what

[3] Some of the writers indicate an apprehension of the external factors; 1 Oppenheim, Int. L. (2nd ed.) 13, *et seq.*

[4] See Lawrence, Int. Law (5th ed.) 13, *et seq.*, for a good discussion of the place of ethics in law and the distinction between them. This distinction also apprehended by Hall, Int. Law (6th ed.) 2; Woolsey, Int. L. (6th ed.) 3.

[5] Hall, Int. Law (6th ed.) 2.

is just in any particular case will only be the opinion of the writer, and it is clear from a cursory examination of the facts of the international life that the conduct of independent states falls far short of the general standard of justice entertained by even the middle classes of the individuals in the world. Justice will therefore figure in our discussion only as an ideal to be striven for but rarely attained,[6] and totally irrelevant in an inquiry into the jural conception of independent state conduct.

The conduct of independent states as determined by these factors forms a body of facts which may be reduced to some semblance of order by analysis, just as in the case of the conduct of individuals. The description of that orderly conduct is referred to as a rule. It is true that the states on particular occasions do endeavor to determine what the rule is, that is, find a description of the conduct to be followed, and determine their action accordingly. Among states we find a very large amount of self-conscious action in which the state is voluntarily and consciously endeavoring to adjust its conduct to some description which may be obtained of conduct in the past, or to the play of the international factors of conduct as they operate at that particular time.[7] There is in international affairs also an unconscious adjustment of the conduct of each independent state to the interests of other states and the welfare of the community of states as a whole, which adjustment is maintained until the incentive to damage the interest of another state becomes so great that the international factors of conduct are disregarded and an act of damage results. The various states follow certain habitual conduct from motives of necessity and self-interest; that is, voluntarily, without any special pressure from another state.[8] This conduct exists apart from any description. We have the same difficulty in international relations in separating the rule and the factors. We can see more clearly, since we are dealing with larger bodies, how conduct to a large extent is orderly, and how

[6] Thus Lawrence, Int. Law (5th ed.) 10-12, says that international law may be regarded as an *a priori* investigation into what the rules of international intercourse ought to be or historical investigation of what they are: "Two principal views may be held as to the nature and origin of these rules (of international law). They may be considered to be an imperfect attempt to give effect to an absolute right which is assumed to exist and to be capable of being discovered; or they may be looked upon simply as a reflection of the moral development and the external life of the particular nations which are governed by them." Hall, Int. Law (6th ed.) 1.

[7] For example, Germany's attempt to justify her violation of the neutrality of Belgium in 1914.

the tendency is voluntarily to adhere to an habitual course of conduct unless there is some powerful motive to the contrary.

An independent state may have an interest, but it cannot have any potentiality of redress secured by external political power for the simple reason that there is no such power in existence. A state, therefore, whose interest has been damaged by the conduct of another state, will be able to obtain redress when denied only by setting in motion the external factors influencing the conduct of independent states to which we have already referred. These factors may also be set in motion by a state which has not been damaged, for selfish purposes. There will often be a difference of opinion, as to which there is no power competent to decide, whether in any case there has been a damage to a state interest, or whether the state is proceeding for the purpose of obtaining redress or merely for selfish ends.[9] The interest of a state may be damaged by the force of nature, by the act of another state, or by the act of an individual. The independent state thus damaged will seek redress through any one or more of the external factors influencing state conduct as follows: Where the damage is caused by act of an independent state against the independent state itself; where caused by act of a dependent state wholly excluded from international life against the independent state on which it is dependent; if partially existing in international life against such dependent state to the extent allowed by the independent state upon which it is dependent. If the damage is caused by a dependent state dependent on the independent state damaged, the redress is a matter of municipal law unless the dependent state exists to such an extent in international life as to bring its conduct wholly or partially within the influence of the factors already referred to affecting the conduct of independent states, in which case the redress is wholly or partially under these. If the damage is caused by an individual, a distinction is to be drawn between a member of the state and an alien. If by a member of the state damaged, the redress is a matter of municipal law. If by a member of another state, the redress is against the state of which he is a member in the same manner as

[8] The general observance of the rules of international law by the independent states of the world remarked on by Manning, Int. L. (2nd ed.), Amos. 89, 90, where he refers to the conscious cultivation of the law and appeal to its standards. See Lawrence, Int. Law (5th ed.) 3; 1 Oppenheim, Int. L. (2nd ed.) 14.

[9] The discussion in this article will, for the purpose of the theoretical examination of international law, be confined to conduct damaging a state interest.

in the case of a dependent state wholly shut off from international life. Where the damage is done to a member of the state while within the jurisdiction of another state, the individual will have the redress, if any, afforded by the municipal law of that state, and his own state will have a redress through international factors of conduct against the other state. In international life, therefore, the law is in a condition of self-help, or rather, we should say, international life is in a condition of self-help; that is, each state must act for itself and cannot rely on any superior political power, as the individual can in municipal life. Although the state must act for itself, the international factors of conduct in many cases constitute an external force assisting the state. It is therefore not strictly accurate to confine our attention to the act of the state and ignore the other elements, because in many cases the state acting by itself will be unable to secure redress.

It appears, therefore, that we have certain bodies and facts concerning those bodies, to wit, their conduct, the external factors determining that conduct, which operate by way of restraint on the inherent power of the state organism, and further, that the conduct so determined may be described in terms of order. Our next task is to define international law, that is, to see how the word "law" is applicable to those facts we have referred to. It is necessary to examine the nature, scope, application and definition of international law, and then dispose of certain subordinate topics, some of which are to be distinguished and excluded from the discussion. In defining international law, therefore, we have to consider the distinction between the conduct and the factors determining that conduct, and further remember that we cannot exclude one or the other of them, but must embrace them all in our definition. International law, therefore, is the conception in terms of order of the conduct of independent states[10] as influenced by external and internal factors, from which external factors are excluded the forces of nature and external political power, which we may call the jural conception of the conduct. It is necessary to add internal factors which were excluded in the definition of law in general, because an individual state is frequently powerfully impelled by self-interest to observe a certain course of international conduct, and secondly, international public opinion will proceed in part from

[10] That independent states are concerned has been recognized by some writers, e. g.—Zouche, L. of Nations (Carnegie ed.) Part I, 1, 2.

within each state, and it is difficult to separate that part of it which is external to a particular state, from that which is internal within that state. It is necessary also to distinguish the point of view. We have past conduct, present conduct and future conduct, and the principal discussion is as to future conduct.

The inquiry in any case will be: (A) What conduct have independent states in the past habitually followed? (B) What conduct do they follow at the present time under one or several external factors, none of which include superior political authority? (C) What conduct may a state consequently be expected, in the absence of any compelling self-interest to act otherwise, to follow in the future, under the influence of these external factors determining conduct? Many definitions of international law have been proposed, and a number of them have been collected in the note.[11] These definitions are generally too narrow, as

[11] International law "is the result of an implied agreement among civilized nations to abide by those practices which have proved most conducive to the promotion of profitable intercourse in peace and to the mitigation of suffering and hardship in war;" Frederic R. Coudert, 36 Amer. L. Reg. and Rev. N. S. 362. "International law is the final expression of the public opinion of the civilized world respecting the rules of conduct which ought to govern the relations of independent nations, and is, consequently, derived from the source from which all public opinion flows, the moral and intellectual convictions of mankind;" Prof. Cairns, quoted—Wheaton, Elements (Dana's ed.) 23. The law of nations when we distinguish it from natural law or international law is the law enjoining the utility of the great aggregate system of communities; Grotius, Belli ac Pacis, Whewell's Trans. Proleg. 17. "The rules of conduct regulating the intercourse of states;" 1 Halleck, Int. L. (4th ed.) 50. "International law consists in certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement;" Hall, Int. Law (6th ed.) 1. "International Law or Common and Conventional Law of Nations is that body of principles, rules and customs which are binding upon the members of the international Community of States in their relations with one another or with the nationals of other states;" Hershey, Int. L. 1. "According to Heffter, one of the most recent and distinguished public jurists of Germany, 'the law of nations, *jus gentium*, in its most ancient and most extensive acceptation, as established by the Roman jurisprudence, is a law (*Recht*) founded upon the general usage and tacit consent of nations. This law is applied, not merely to regulate the mutual relations of States, but also of individuals, so far as concerns their respective rights and duties, having everywhere the same character and the same effect, and the origin and peculiar form of which are not derived from the positive institutions of any particular state,'" Heffter, quoted by Wheaton, *op. cit.* 16. "International law may be defined as the rules which determine the conduct of the general body of civilized states in their mutual dealings;" Lawrence, Int. Law (5th ed.) 1. "The law of nature realized in the relations of separate nations;" 1 Lorimer, Inst. 1. "The law of nations is the realization of the freedom of separate nations by the

they emphasize either the description of the conduct or one or the other of the international factors, and many of them incorporate the ambiguous word "right."

International law is a pure conception, a conception from which the external factor of superior political power is excluded, and is therefore difficult for the English-speaking lawyer to grasp because he is accustomed to thinking of law as having that external factor present. Grasp that distinction he must if he wants to understand international law. International law can have no

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reciprocal assertion and recognition of their real powers;" 1 Lorimer, *op. cit.* 3. "It is in this limited sense, namely, as comprising the rules which control the conduct of independent states in their relations with each other, that the term 'Law of Nations' is employed in the following treatise;" Manning, Int. L. (2nd ed.) Amos. 3. "Law of Nations or International Law is the name for the body of customary and conventional rules which are considered legally binding by civilized States in their intercourse with each other;" 1 Oppenheim, Int. L. (2nd ed.) 3. "From the nature then of States, and from the nature of individuals, certain rights and obligations towards each other necessarily spring; these are defined and governed by certain laws. These are the laws which form the bond of justice between nations . . . and which are the subject of international jurisprudence and the science of the international lawyer, *jus inter gentes*;" 1 Phillimore, Int. L. (3rd ed.) 3, 4. Pufendorf says that "the rules of abstract propriety, resting merely on unauthorized speculation, and applied to international transactions, constitute international law and acquire no additional authority when by usage of nations they have been generally received and approved of;" 1 Wildman, Int. L. 28, quoted Woolsey, Int. L. (6th ed.) 12, 13. "I claim then that the aggregate of the Rules to which nations have agreed to conform in their conduct towards one another are properly to be designated 'International Law;'" Lord Russell, Address at Saratoga Springs, 12 Law Quar. Rev., 313. "The proper and immediate subjects of the Law of Nations being those political communities which are in a state of Independence, and a test of their independence being their aptitude or capacity to discharge the obligations of Natural Society towards other political communities, and to regulate the mode of discharging their obligations without the consent of any Political Superior, the rules which result from mutual relations and which govern their intercourse, resolve themselves into Natural rules and Positive rules and the aggregate body of those rules which admit of being enforced, constituting the Law of Nations in the most extensive sense of the term;" Twiss, L. of Nations, Peace (2nd ed.) 145. "The Law of Nations is the science which teaches the rights subsisting between nations or states and the obligations correspondent to those rights;" Vattel, Chitty's Trans. Prelim. §3. "International Law, otherwise called the Law of Nations, is the law of the society of states or nations;" 1 Westlake, Int. L. (2nd ed.) 1. "International law, in a wide and abstract sense, would embrace those rules of intercourse between nations, which are deduced from their rights and moral claims; or in other words, it is the expression of the jural and moral relations of states to one another. . . . In a more limited sense, international law would be the system of positive rules, by which the nations of the world regulate their intercourse with one another. But in the strictness of truth this definition is too broad, for there is no such law recognized as yet through all nations. . . . Coming within narrower limits, we define international law to be the aggregate of the rules which Christian states acknowledge, as obligatory in their relations to each other, and to each other's subjects;" Woolsey, *op. cit.*

motive, no purpose, no subject, no object. The conduct followed by a state may have such a character and also the factors influencing that conduct, but it is difficult to see how the conception of the conduct as so determined can have any such characteristics. It is true that in practice we say the law compels this. The statement is ambiguous. What we mean is, that the state, acting through its appropriate organs, will attempt to furnish redress as to conduct of a certain description.

Much confusion exists because of the failure to distinguish the factors and the conduct from the conception of international law, and a number of different notions have from time to time been put forward, some of which when critically examined are seen to be mere offsprings of that confusion and accordingly are to be banished from the realm of accurate thought. Other notions correctly express one or more aspects of the operation of the international factors of conduct and to that extent are to be retained. There are several headings under which this part of the discussion usually appears, and it will perhaps simplify our attack upon the problem if we take it up under them. The writers usually discuss the legal nature of international law, the sanction of international law, the scope and application of international law, and the subjects and objects of international law.

2, 3. "International law, as understood among civilized nations, may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent;" Wheaton, *op. cit.* 23. "Public international law is the body of generally accepted principles governing relations among states;" Wilson, Int. L. 3. See n. 3 for collection of definitions. "International law is the customary law, which determines the rights and regulates the intercourse of independent states in peace and in war;" 1 Wildman, Int. L. 1. "International laws are rules of conduct observed by men towards each other as members of different states, though members of the same International Circle;" Walker, Science, Int. L. 44. "International law consists in those rules of conduct which civilized states observe in their relations with one another and with one another's subjects;" Walker, Man. Int. L. 1. "International law is the code of states and of communities to which has been accorded recognition of belligerency;" Walker, *op. cit.* 3. "Law between Nations is the law which is recognized in the community of different princes or peoples who hold sovereign power—that is to say, the law which has been accepted among most nations by customs in harmony with reason, and that upon which single nations agree with one another, and which is observed by nations at peace and by those at war;" Zouche, L. of Nations (Carnegie ed.) Part I, 1. "The various ideas of law formed in different societies and times, and the various groups of customs which have been obeyed as law, have probably not yet been sufficiently compared and analyzed, and until an adequate comparison and analysis have been made, no definition or description of law can be regarded as final;" Hall, *op. cit.* 14.

Thus, many writers undertake to prove that international law is of a legal nature. If the propositions we have laid down are correct, there is no occasion for the discussion because international law is by the definition a conception in terms of order of the conduct of certain bodies, and therefore as much of a legal nature as the like conception of the conduct of individuals. The views of the writers, however, are not disposed of so easily. The discussion of the question whether rules of international law are legally binding plainly begs the question because it involves the meaning of law, and further, fails to distinguish that there is no factor of political power in international relations, and that therefore international law is different from municipal law. If, however, law is used, as it often is, to mean the external factor of superior political power, then international law is not law because there is no superior political power. The controversy, therefore, is hopelessly obscured in the ambiguity of the word "law" and reaches no rational conclusion. When it is carefully analyzed we will find it is nothing but a meaningless controversy over words. The views of some of the writers are collected in the note.[12]

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[12] Hall, Int. Law (6th ed.) 13-16, says international law constitutes a branch of true law because cast in a legal mould and treated in practice as being legal in character, although lacking the sanction of determinate political authority, and lying, as he admits, on the extreme frontier of law. Hall, *op. cit.* 18, says absolute independence of state is unnecessary to the conception of a legal relation between communities independent of each other; that international law could exist just as well in a world of equal states dependent on a common superior, which is true, because then there would be a common political superior exercising to a greater or less extent the power of state. It is not, however, a question of conception, but a question of fact. We are studying bodies which have no external superior in fact, and that is all there is to it. The facts might have been otherwise, they may be otherwise in the future, in either of which events we will be studying different facts. Hershey, Int. L. 5-9, describes international law as a branch of true law and discusses the external factors determining state conduct. The proposition he states demonstrates the obscurity in the use of the word law. If true law is municipal law, then law must have political power to enforce it and international law is not true law. He points out that some branches of municipal law are not enforced by political power of the state and that, in some cases, where the political power assumes to act, it fails because the people are not in accord. That is to say, the factors determining conduct in municipal life may not agree with the political power and its exercise will be futile. Lawrence, Int. Law (5th ed.) 2, says that the principles of international law are rules whether they are or are not laws, but the question whether it (international law) confers rights, depends on whether the term law is properly applied. The question as to the application of the term law depends on the definition of the term law. It is reasoning in a circle to argue that the distinction between international and municipal law is based on any meaning given the word law. 1 Oppenheim, Int. L. (2nd ed.) 8-15, after

There can be no sanction of international law, as that word is applied to municipal law enforced by political authority. There are, however, the external factors of compulsion which may be

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defining law as a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power, concludes that international law is law in the same sense because he finds in international life all the three elements of law, to wit: a community, which is a community of nations; second, a body of rules for the conduct of the members of the community. These rules he finds in the rules of conduct which have grown up in the last few centuries and in the written rules created by international agreements. And a third element, in a common consent of the members of the community that these rules shall be enforced by external power, which external power he finds in self-help and intervention on the part of other states which sympathize with the state wronged. This external power, however, does not include superior political power of the state; therefore, the supposed analogy breaks down as to one of the elements. 1 Phillimore, Int. L. (3rd ed.) 76-78, answers the objection that there can be no law between independent states because no common political superior, as follows: (1) As a matter of fact, states do recognize the existence and independence of each other, out of which society law must necessarily spring, that the rule of right regulating intercourse between themselves is such law, which is no answer but simply an assertion that law exists in such a society, which is denied by the proposition. (2) The proposition confuses the physical sanction of law enforced by political superior and the moral sanction of right. (The learned judge would have more accurately said, the proposition takes only one view of the possible meaning of law and excludes the other—not so much a confusing of the two as an overlooking of one.) That irrespective of the international means of enforcing, the law must remain, as God has willed the society of states as He has that of individuals. (3) Most, if not all, civilized states have incorporated into their own municipal law a recognition of the principle of international law. While this clearly refers to the acknowledgment by individual states of the existence of international law, it sheds no light upon the proposition which is as to the quality or character of that law. (4) History demonstrates that a certain nemesis overtakes the transgressor of international justice, citing the first partition of Poland as opening an "Iliad of Woes." It may be true that a nemesis does overtake the wrongdoer, but an accurate reading of history will fortify the conclusion that the wicked go unpunished in international life as often as they do in municipal life, and the instances in which they do in municipal life are certainly very frequent. Twiss, L. of Nations, Peace (2nd ed.) 175, 176, however, answers more accurately—that the absence of any superior political power is immaterial since the rules of international conduct are in fact enforced by factors external to the independent states, and therefore may be described as law since any rule enforced by external factors is law. "International Law in Legal Education," J. B. Scott, 4 Columbia Law Rev. 409, "The Binding Force of International Law," A. Pearce Higgins. See review in 11 Columbia Law Rev. 699 and 5 Amer. J. Int. Law, 850. "The Legal Nature of International Law," James Brown Scott, 1 Amer. J. Int. Law, 8, 31 *et seq.* "The Influence of Christianity on Law of Nations," 2 Ward, Hist. 1 *et seq.* "The Development and Formation of International Law," Ernest Nys, 6 Amer. J. Int. Law, 1 *et seq.*, 279 *et seq.* "The Influence of the Law of Nature Upon International Law in the United States," Jesse S. Reeves, 5 Amer. J. Int. Law, 547 *et seq.* "The Reconstruction of International Law," Franz von Liszt, 64 Univ. of Penna. Law Rev., 765. "International Justice," James Brown Scott, 64 Univ. of Penna. Law Rev. 774.

described as a sanction.[13] International life is in a condition of self-help, that is, each state must, if it cannot persuade another state to afford redress, take measures to compel that redress. The difficulty is that this freedom of action has and does result in many acts of oppression and is used for selfish purposes, which circumstances have led the writers, confused by ethical notions, to attempt to pass judgment on particular acts, and suppose that there is some power to determine what a state shall or shall not do, which supposition, however, is nothing but the opinion of the writer upon the state conduct in question.

There is great confusion among the writers in an attempt to define the scope and application of international law. The scope and application which is thus referred to is really a description of the operation of the international factors of conduct, and since international law is a conception in terms of order of the conduct of certain bodies as determined by those factors, our attention will necessarily be confined to the bodies so subject. The application of these factors to the conduct of independent states, therefore, determines the limits of our inquiry. There are certain independent states which are said not to be within the scope of nor subject to international law. An examination of these bodies and of their peculiar situation will more clearly illustrate the principle that what we are really discussing is the operation of international factors of conduct and not the abstract conception of law.[14] A state is a member of the family of nations when it is responsive to an equal extent with the other states to the factors determining the conduct of independent states. Since there are factors, external and internal, determining the conduct of independent states, and these factors operate equally on each

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[13] "The Sanction of International Law," Amos J. Peaslee, 10 Amer. J. Int. Law, 328 et seq.

[14] Hershey, Int. L., 96, observes that some publicists say that the scope of international law is as wide as humanity itself and its range extends over the whole earth. 1 Oppenheim, Int. L. (2nd ed.) 30, entitles his discussion, "Dominion of the Law of Nations," and says "Dominion of the law of nations is the name given to the area within which international law is applicable, that is, those States between which international law finds validity," and then considers the question of what states are subjects of the law of nations, whether only Christian or whether Christian and all others, and concludes that it is Christian and some others. There is objection to the use of the word "dominion" and the word "area" in discussing the application of law. Area seems to imply space, but law applies only to conduct and has no reference whatever to space. The learned professor's idea that law is law between the states, that is, fills up spaces between the states, is, it is believed, entirely out of place.

state, it follows that if a state is in such circumstances that it cannot and will not respond to an equal extent with the other independent states to these factors, it cannot fully participate in international life with them. States, therefore, which are barbarous and uncivilized, without commerce, and not having a public opinion corresponding in a measure to the international public opinion of the civilized states of the world, are not in a position to participate equally with the other independent states in the benefits of international life.[15] Such a state will not be responsive to the same factors which will determine the conduct of other independent states. This is a somewhat difficult point to apprehend. The independent civilized states of the world show in their relations with each other a state of warfare and violence which is but little removed from barbarism. It therefore seems somewhat peculiar to say that a state participating in such a rough and tumble life can set itself up in any way superior to a barbarous state, such as, for instance, Afghanistan, Persia, Patagonia, Ethiopia, or the Barbary States as they were in 1800. The facts remain, however, that these independent civilized states, in spite of their continual fighting, are subject to the external factors determining state conduct, and even in their wars, to a greater or less extent, conform their conduct to the rules of international law. There is, therefore, an appreciable or measurable conformity with international law, hand in hand with frequent instances of its disregard and violation. We must, therefore, in considering this aspect of the subject, shut our eyes to the violations of international law by independent civilized states, and recognize that the barbarous state would not conform to international law even to so great an extent as these independent civilized states. This has been illustrated by numerous instances in history, and therefore it has been necessary for the states comprising the family of nations to adopt towards these communities a somewhat different attitude.[16]

Since a dependent state has no freedom of international ac-

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[15] What has been called reciprocating will, 1 Lorimer, Int., 109 *et seq.*, reciprocating power, 1 Lorimer, *op. cit.*, 133 *et seq.*

[16] In their intercourse with distant and weak states there has been too much disposition among the states of Europe to avail themselves of that law (law of nations) when it has been "in their favor and to repudiate its obligations when it would have been against them;" Manning, Int. L. (2nd ed.) Amos. 88n; See Woolsey, Int. L. (6th ed.) 4. International law is not confined to Christian States or members of the family of nations; I Phillimore, Int. L. (3rd ed.) 20-23; see Lawrence, Int. Law (5th ed.) 57, 58.

tion, it cannot freely adjust itself to the current of international life. Its conduct, therefore, depends on the will of the state on which it depends and is the conduct of that state. The only conduct we are studying is international conduct, and the conduct of independent states only is, therefore, the subject of our discussion. Independent states can only be expected to look to other independent states for redress for state acts. It would be footless for a state to call a dependent state to account and have the latter answer that it was subject to another state, to which the complaining state must look for redress. The scope and operation of international law is therefore the scope and operation of the international factors of conduct. There is another ambiguity in this connection which should be noticed. It is sometimes said that the rules of international law apply to land, open sea, vessels.[17] The factors of international conduct can operate only on the bodies of the independent states and may determine their conduct as to land, the open sea, vessels, but cannot affect or in any way determine the conduct of such objects.

An object is anything which comes within the cognizance of senses and when used in connection with the word activity indicates that which is affected by the action or to which the action civilized states. This has been necessary for the setashrdluetau is directed. A subject is a body under the power of another. Since international law is an abstract conception, it can have no subject and no object. The writers, however, constantly use these words as applicable to various things which they conceive to be the subjects or objects, as the case may be, of international law. An independent state is undoubtedly subject to the international factors of conduct, but not subject to any abstract conception of law. The word "subject" therefore is properly applicable to those bodies, and since the international factors of conduct connote activity, that is, the activity of the factor, the thing which is affected by that activity, to wit, an independent state, is properly described as an object. When, therefore, we accurately use these words, we find that an independent state is as well the

[17] Thus, Hershey, Int. L. 171, says that the objects of the law of nations are (1) Material goods and things; (2) Individuals or persons (including corporations), and that the main things to which the rules of international law apply are land territory, the open sea, vessels and other public property of various sorts. A tempest may sweep a vessel from her moorings, but if the port regulations require that she be moved, that can only be accomplished by the act of individuals whose conduct, with respect thereto, is determined by the external factor of the political power of the state.

object as a subject of international factors of conduct and is neither of international law. It is said, for instance, that states are the subject of international law, and individuals the object. The use of the words "subject" and "object" in this connection betrays a failure to keep in mind the exact nature of law. Subject and object necessarily imply action of some sort, the one—the doer of the act, the other—the end or thing to which the act tends or upon which it operates.

We have referred in the note to some of the current views as to what are objects and subjects of international law.[18]

An individual is always subject to the political power of some state expect in the rare case where he throws off political restraint and ventures in the international world alone.[19] He is therefore not in any way affected by the international factors of conduct because he is subject to a factor, to wit, external superior political power, which does not exist in the international world, and which factor, by its operation, shuts him entirely out of

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[18] States, subjects: Hershey, Int. L. 92; Lawrence, Int. Law (5th ed.) 54, 76; 1 Phillimore, Int. L. (3rd ed.) 79, 213; Wheaton, Elements (Dana's ed.) 29, 30. Nations, subjects: Twiss, L. of Nations, Peace (2nd ed.) 145; Wheaton, *op. cit.* 29, 30. Envoys, objects not subjects: 1. Oppenheim, Int. L. (2nd ed.) 455, 456. Fugitive criminal, from certain point of view, object: Hershey, *op. cit.* 263. Individuals and corporations objects not subjects: Hershey, *op. cit.* 236; 1 Oppenheim, Int. L. (2nd ed.) 362, 363. Individuals, subjects: see authors referred to by Hershey, *op. cit.* 92 n2. Private corporations, subjects: Wheaton, *op. cit.* 30, 31. Princes, subjects: Wheaton, *op. cit.* 31. Wheaton there says, "The peculiar objects of international law are those direct relations which exist between nations and states." The objects consist of the rights which are to be ascertained, protected and enforced by international law; 1 Phillimore, *op. cit.* 79, 213. The rights of individual states and their sovereigns constitute the subjects of international law; 1 Wildman, Int. L. 38. Material goods and things, objects: Hershey, *op cit.* 171. The open sea, object; 1 Oppenheim, *op. cit.* 323. See 1 Lorimer, Inst. 15, who says the general object of international law is liberty. "The proper and immediate subjects of the Law of Nations being those political communities which are in a state of Independence, and the test of their Independence being their aptitude or capacity to discharge the obligations of Natural Society towards other political communities and to regulate the mode of discharging those obligations without the consent of any Political Superior, the rules which result from their mutual relations, and which govern their intercourse, resolve themselves into natural rules and positive rules, and the aggregate body of those rules, which admit of being enforced, constitute the Law of Nations in the most extensive sense of the term. The Law of Nations accordingly divides itself into natural or necessary law, and positive or instituted law." Twiss, L. of Nations, Peace, *op. cit.* 145. Hall, Int. Law (6th ed.) 17, speaks of the capacity in corporate person to be subject to law as depending on the existence of a sense of right and of a sense of obligation to act in obedience to it, either on the part of the community at large or at least in the man or body of men in whom the will governing the acts of the community resides.

[19] Zouche, L. of Nations (Carnegie ed.), Part II. V. 1.

international life. The political canopy of the individual's own state protects him from international life, and all its incidents and that canopy intercepts the international factors of conduct before they can reach him. An individual is touched with international life, if at all only as a member of an independent state and not in any other capacity. The discussion relates solely to the conduct of independent states, and they are distinguished because they are the only bodies in existence having no political superior power, and every other body and all individuals in the world are subject to such political power. It follows, therefore, that there is a vital distinction between the exercise of that political power by the state and the aspect of that state with respect to non-existence of political power by any other body. The distinction is between municipal life with political jurisdiction, and international life and lack of political jurisdiction.[20] The position of an individual in international law has given rise to considerable speculation among the writers who have elaborately discussed the question whether he has any rights in international law.[21] This is another of the many instances of the use of the ambiguous word "right." We shall point out that a state has no right at all except when we use that word in the sense of an interest or of power. The individual, therefore, in so far as he appears or acts through his own state, has also no rights except as that word is used to describe an interest or power.

The word "right" is used in several different senses, among which are: (A) power,[22] (B) interest, (C) potentiality of having redress afforded by the political power of the state, (D) that which is just. Where interest or power is meant, these words will be substituted for "right." There is no occasion for retaining such an ambiguous term, and it will accordingly be discarded, although reference will sometimes be made to its use by the writers. No reader of international law can fail to be struck with the utterly inadequate discussion of the so-called rights of states which is found in the writers. The discussion always begs the question by assuming that there is a right, and then without defining it, enumerating what the writer conceives may be done in the exercise of that right. Many writers, perhaps the majority, adhere to the notion that a state has a right,

[20] Lawrence, Int. Law (5th ed.) 72, *et seq.*; 2 Lorimer, Inst. 131; Oppenheim, Int. L. (2 ed.) 362, *et seq.*

[21] *Supra,* footnote 20.

[22] Grotius, Belli ac Pacis, Whewell's Trans. I. c. I. V; Vattel, Chitty's Trans., Book I §95.

and classify under various names, which are appended in the note, what they call the right of states.[23] The learned authors are sometimes describing the interests of a state and use the word "right" in that sense, or they are sometimes describing the powers of a state and using the word "right" in that sense, a loose use of language which is only too prevalent among writers on international law and legal philosophers.[24] A distinction was formerly drawn between perfect and imperfect rights. A perfect right was said to be accompanied by a power of compulsion, and an imperfect right was unaccompanied by any such power. The only compulsion in international life is self-help, the exercise of which lies solely in the discretion of the state concerned.[25] The distinction, therefore, is without weight and has been discarded by some writers.[26]

The question has been raised by a number of writers whether a state can be guilty of a crime. It seems that it cannot in any sense in which the word "crime" is used in municipal law. In that jurisdiction, a crime is an act punishable by the political power of the state. The word "crime," may be used in an ethical sense, as designating an act whether it is or is not punishable

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[23] For references to conflicting views on the subject of rights, see Hershey, Int. L. 143 n1.

[24] The conventional classification of rights with the real equivalence is shown in the following table:

Right of Self-preservation = self-interest plus power of protecting that interest.
Right of Possession = interest and power.
Right of Jurisdiction = power.
Right of the Sea = interest in and power over the sea.
Right of Legation = power of sending an envoy.
Right of Treaty = power of making a treaty.
Right of Intercourse = power of intercourse.
Right of Civil and Criminal Legislation = power of legislation.
Right of Equality = fact of equality and interest in being equal.
Right of Respect = interest in self and power to compel others to respect that interest.
Right of War = power to make war.

See generally as to the above: Hall, Int. Law (6th ed.) 43 *et seq.;* 1 Helleck, Int. L. (4th ed.) 100, 125, 156, 198, 288; Hershey, Int. L., 155, *et seq.;* 1 Phillimore, Int. L. (3rd ed.) 213; Twiss, L. of Nations, Peace (2nd ed.) 178-440; 1 Westlake, Int. L. (2nd ed.) 306; Wheaton, Elements (Dana's ed.) 89, *et seq.;* 1 Wildman, Int. L. 2; Wilson, Int. L. 55, *et seq.;* Wilson & Tucker, Int. L. 55, *et seq.;* Woolsey, Int. L. (6th ed.) 15, *et seq.*

[25] Vattel, Chitty's Trans., Prelim. §17. These authors retain conception of perfect and imperfect right: 1 Halleck, Int. L. (4th ed.) 471, 472; Twiss, L. of Nations, Peace (2nd ed.) 12, 13; 1 Westlake, Int. L. (2nd ed.) 156.

[26] Hershey, Int. L. 143, n1, says it is now generally abandoned, but cites no authority.

by the political power of the state. From the point of view of ethics, therefore, we may designate the acts of state as criminal, but since there is no political power superior to the independent states of the world, it seems inadmissible to designate such act as a crime in the sense in which that word is used in the municipal law.[27]

The word "responsibility" is used in several slightly different senses: (A) as meaning the circumstance of being subject to some external factor determining conduct. Thus, if I murder my neighbor, I am responsible to the political power of the state. This is the meaning ascribed to the word by the writers, who say a state is responsible. They, however, involve themselves in the ambiguity raised by the use of the word "law," particularly when they speak of the legal responsibility of states. An independent state is subject to the external factors determining international conduct, and a writer therefore must use the word "law" as standing for the jural conception embracing all these factors or as defining the particular factor he has in mind as designated by the word "law." Any other course opens him to the well founded charge of obscurity. The statement, therefore, that a state is responsible is predicated entirely on what the factors are and how the conduct is determined, and to what extent they are operative, and is therefore a merely identical statement. (B) The word "responsible" is used by English speaking judges and lawyers in another sense, as referring to personal capacity to comply with the requirements of the external factor of political power. Thus, we speak of the irresponsibility of lunatics, infants and bankrupts; of the responsibility of a normal person and of a person of financial solvency. Here, the person is subject to the external factor, but for reasons peculiar to himself, is unable to conform thereto, which inability may or may not be an excuse for such failure.[28] In the case where the government

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[27] 1 Halleck, Int. L. (4th ed.) 59; Hershey, Int. L. 161 n2; 1 Lorimer, Inst., 160 *et seq.;* 1 Oppenheim, Int. L. (2nd ed.) 209, 210; 1 Phillimore, Int. L. (3rd ed.) 5; 3 Phillimore, Int. L. (3rd ed.) 58.

[28] This is one of the many instances which make the writings on international law such strange reading to practical lawyers. A slight difference like this in the meaning of the word gives the whole discussion a different color. Responsibility in the municipal law is the normal state of affairs, and the case to which our attention is particularly called is the case where there is a departure from that normal state of affairs, that is, the case of irresponsibility. The same conception appears in popular usage when we speak of the irresponsibility of youth. Now the question is, is there any distinction between states with respect to capacity?

of a state is decayed or incapable of properly performing its functions, the state is, for the time being, temporarily incapacitated from participation in international life. Some writers have gone so far as to say that the capacity of the state for international functions is dependent upon the form of the government, and that an autocracy is such a form of government as precludes the state from a proper participation in international life.

The discussion of the origin of international law is involved in an indiscriminate use of the words "basis," "source," "origin," and in a failure to distinguish the various conceptions for which the word "law" is commonly used. Source means that from which any act, movement or effect proceeds, and is, accurately speaking, that which furnishes a first and continuous supply. Basis is that on which anything rests, its support or foundation, while origin is the commencement of the existence of anything, and does not involve the idea of any further supply from that source. It will now be in order to ascertain, if possible, how these words are properly applicable to international law. We have, therefore, (A) the origin of state conduct which is simply an historical fact, (B) the origin of the external factors of compulsion, (C) the origin of the mental apprehension or jural conception of state conduct. In municipal law, we have the external compulsion of the political power of the state, and find it necessary to examine the origin of that political power. No such necessity confronts the student of international law because no such external factor exists in the international world. The origin of the other factors in the international world is clear. A self-interest of the state originates with its existence. The origin and growth of international public opinion, the origin and growth of ethical standards, the origin of pressure from other states will originate with the existence of other states. Influence of state conduct in the past is a matter of precedent. It is submitted that there can be no accurate idea of the origin of international law without a clear notion of its various elements. It is almost as impossible for the academic mind to conceive of law disassociated

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Every state is, as we have seen, a living organism having a government as its organ of participation in international intercourse. We may possibly say that such an organism without civilization, commerce or public opinion, is in fact incapable as an organism of participating equally with other states in international life. Such a distinction has been suggested in the exclusion of certain barbarous and uncivilized states from the scope of international law and from membership in the community of states. See Hall, Int. Law (6th ed.) 53, 214, 218, 220; Hershey, Int. L. 161, *et seq.;* 1 Oppenheim, Int. L. (2nd ed.) 206 *et seq.*

from ethics as it is for the practicing lawyer to form an idea of law without political power of a state to enforce it. Difficult as the intellectual feat is in each case, it must be performed before either can clearly understand the subject of international law. We have collected in the note a reference to the views of some of the writers. It appears from an examination of them that they all fail to distinguish the various elements for which the word "law" may stand, and most of them emphasize the ethical element and ignore that of precedent, self-help and force.[29] This adjustment of conduct is as necessary to the life of the community of states as it is to individual life within a community. Necessity, therefore, is a powerful force impelling orderly conduct among independent states.[30] Some writers base international law on common consent,[31] but no one has been able to point to any evidence of that consent. It is not that the states consent to law, but that they voluntarily exist in a community life, which life necessitates law. The law goes with the community life. It might as well be said that a man who rides a bicycle consents to balance himself. The balancing goes with the riding to which the consent is given.

There is this distinction, however, to be drawn as to the contract theory between municipal law and international law. Every individual comes into a community involuntarily—by being born into it; sometimes voluntarily—by moving in; but mostly by birth. It is therefore not possible to find in fact any consent, agreement or promise by any individual, express or implied; but in the case of states, the members of a community of nations do enter the body more or less voluntarily and by the express act of the members already in. There is no evidence of any promise made by any state at the time of its becoming a member, either express or implied, or of any understanding that such state shall abide by the rules of conduct obtaining within the family of

[29] Wheaton, Elements (Dana's ed.) 3, says that the origin of international law must be sought in the principles of justice applicable to the relations of states, and the first inquiry, therefore, is—what are the principles of justice which ought to regulate such relations, that is to say, from what authority is international law derived? 1 Oppenheim, Int. L. (2nd ed.) 4, says that international law in its origin is essentially a product of Christian civilization. "The guiding motive or purpose of international relations should be utility or the satisfaction of collective needs and interests, whether intellectual, moral or material;" Hershey, Int. L. 19. The word "should" indicates that the learned professor is advancing his opinion of the ethical basis of international law.

[30] Lawrence, Int. Law (5th ed.) 3.

[31] 1 Oppenheim, Int. L. (2nd ed.) 16.

nations. The state by adhering to the gregarious condition of independent states, thereby brings itself within the orderly conduct followed therein, and no case has arisen where any state has voluntarily left the community of nations.

We have the conception of conduct which we call law and the facts used in framing that conception. We may go as far back in the chain of causation as we please, with the danger of being diverted on the way into some collateral issue, a fate which has befallen many of the writers. The origin of law may be described as follows: Man exists as an animal and exhibits a gregarious instinct,—hence the community life; hence external factors determining conduct arising from the presence of other men, among which is the political power of the state; hence a large community comprised of these other communities in which there is no superior political power to determine conduct; hence the legal philospher endeavoring to frame a theory of the facts; hence a difference of opinion as to what to call the mental conception.[32]

Source means that from which any act, movement or effect proceeds. The word is used to describe the natural facts of the physical world, as the source of a river. It is used by historians as describing the documents from which a knowledge of history is derived, and in the latter case it is obvious that the documents are not the source of historical facts themselves, as the spring is the source of a river. The writers, however, fail to make this distinction and describe the source of international law in a very confusiong way.[33] The various treaties, statutes, judicial decisions, acts of state, to which they refer, are simply historical facts from which we may learn what state conduct in the past has been and how it has been influenced by any of the external factors determining state conduct. The opinions of the writers have more or less weight according to the authority of the authors and extent to which the opinion conforms to the actual necessities of international life. Some of the views as to the source of international law are collected in the note.[34] Since international

[32] Hershey, Int. L. 17-19, says that international law is ultimately based upon the innate or inherited sociability of human nature directed by specific human needs and interests. That the guiding motive or purpose of international relations should be utility or the satisfaction of collective needs and interests, whether intellectual, moral or material. Social utility is the ultimate test of international as well as of all human law.

[33] "'Source of Law' is therefore the name for an historical fact out of which rules of conduct rise into existence and legal force;" 1 Oppenheim, Int. L. (2nd ed.) 21; Manning, Int. L. (2nd ed.) Amos. 66n.

[34] Hall, Int. Law (6th ed.) 5, takes the view that the evidence of in-

law is a mental conception of international conduct as determined by certain factors, the source of that conception will be the conduct and the factors, which latter, however, will have their source in the facts of human existence.

Various kinds or rules of international conduct have been described by the authors, some of which, when closely examined, are seen to reflect the particular views as to the special factor of compulsion influencing state conduct which is in mind. Others attempt to set up the conception that there are different divisions of international law irrespective of any external factors involved and applicable to particular classes of states. Others, under the guise of different terms, put forward some theory as to the nature of international law. Some of the terms which have

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ternational law is to be found in such international usage as can be looked upon as authoritative. 1 Halleck, Int. L. (4th ed.) 60-68, gives the sources of international law as follows: (1) Divine law; (2) History; (3) Roman civil law; (4) Decisions of prize courts; (5) Judgments of mixed tribunals; (6) Ordinances and commercial laws; (7) Decisions of local courts; (8) Works of text writers of approved authority; (9) Treaties and compacts; (10) State papers and diplomatic correspondence. According to Hershey, Int. L. 19-24, the primary sources of positive international law are: (1) Custom, based on tacit consent and imitation, and (2) Convention or express agreement by means of treaties; and he says that the evidences or witnesses of international law are the places where law as applied or agreed upon is found, or the documents which bear evidence or witness to existing principles and customs. He mentions: (1) treaties, (2) judicial decisions, (3) unilateral state acts, (4) opinions of statesmen, (5) writings of eminent jurists, and (6) histories of international relations. Lawrence, Int. Law, (5th ed.) 98-114, says there are five sources: (1) Works of great publicists. (2) Treaties. (3) Decisions of prize courts, international conferences and arbitral tribunals. (4) International state papers other than treaties. (5) Instructions issued by states for the guidance of their own affairs and tribunals. Lawrence, *op cit.* 97, says source may mean: (1) The beginning of law as law, clothed with the authority required to give it binding force, in which case the only source of international law is the consent of nations. (2) The place where its rules are first found, whether in an authoritative or unauthoritative form. "The word 'source' . . . as applied to law has, at the least, two distinct meanings, which, however, are clearly connected. The one is that of the quarter to which recourse must be had to know what a rule of law is. The other is the immediate fact or group of facts which originally called a rule of law into existence. It is a peculiarity of the Law of Nations that, in reference to it, the two meanings are scarcely distinguishable." Manning, Int. L. (2nd ed.) Amos 66, n. Manning discusses the sources of the law of nations and says that the obligations on which that law is based consist of (*a*) natural law, with which the right obligation of the principle of utility is identical; (*b*) obligations arising from custom; (*c*) obligations arising from convention, and compares to these, three headings: equity, common law and statute law. 1 Oppenheim, Int. L. (2nd ed.) 22, says that there are two sources of international law: (1) Express consent, as a treaty laying down rules for future conduct; (2) Tacit consent, which is given where states have adopted the custom of submitting to certain rules of international conduct, and that treaties and custom are therefore exclusively the sources of the law

been used are as follows: Actual,[35] Administrative,[36] American,[37] Common,[38] Conventional,[39] Customary,[40] Comity,[41] European,[37] General,[42] Ideal,[35] Morality,[43] Natural,[44] Necessary,[45] Positive,[46] Real,[35] Particular,[42] Theoretical,[35] Universal,[47] Voluntary.[48] These distinctions are unnecessary, and, it is submitted, unsound. If international law applies to all independent states, it must have the character of continuity and universality. International law is a body of rules all having the same quality and nature. There can be no distinction in this respect between

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of nations. 1 Phillimore, Int. L. (3rd ed.) 68, recapitulates a rather rambling and somewhat confused discussion of the sources of international jurisprudence by saying that the sources from which that jurisprudence is derived are: (1) Divine law, of which there are two branches: (*a*) Principles of eternal justice implanted by God in all moral and social creatures, including governments; (*b*) Revealed will of God. (2) Reason which governs the application of these principles. (3) Universal consent of nations expressed by: (*a*) Positive compact or treaty; (*b*) Implied usage, custom and practice, which are evidenced by precedent, recorded in history, treaties, public documents of states, marine ordinances, decisions of international tribunals, works of eminent writers. 1 Phillimore, *op. cit.* 45, says that the history and treaties are the repositories and evidence of usage, the great source of international law, and, on p. 46, quotes Grotius as saying that incidents recorded in history do not merely by virtue of being so recorded constitute precedents of international law; that such incidents are bad or good. 1 Westlake, Int. L. 2nd ed.) 14, says that custom and reason are the two sources of international law. Wheaton, Elements (Dana's ed.) 23, *et seq.*, says the various sources are: (1) Text writers of authority, (2) Treaties, (3) Ordinances of particular states prescribing rules for the conduct of their commissioned cruisers and prize tribunals, (4) Adjudication of international tribunals, such as boards of arbitration and courts of prize, (5) Written opinions of official jurists given confidentially to their governments. (These he calls another depository of international law, but has not used the word "depository" with reference to the former headings.) (6) History of wars, and other transactions relating to the public intercourse of nations. Woolsey, Int. L. (6th ed.) 28, says the helps for ascertaining what international law is or has been may be derived principally from the following documents: (1) The sea laws of various ports, (2) Treaties in which a large number of important nations have a part, (3) Judicial decisions, (4) State papers on controverted points, (5) Treaties which, with reason or by accident, have acquired standing above others. The following emphasize the influence of the Roman Law: 1 Phillimore, *op. cit.* 30, *et seq.;* 1 Westlake, *op. cit.* 15. For further discussion, see 1 Lorimer, Inst. 19, *et seq.;* 1 Phillimore, *op. cit.* 643; Twiss, L. of Nations, Peace (2nd ed.) 145-177; Vattel, Chitty's Trans. Prelim., LV.

[35] *Actual and Theoretical, Real, Ideal:* This is modern terminology and differentiates the law which it may be supposed does exist from the law which in theory should obtain. It is as impossible to form an accurate idea of the rules of international law which in fact prevail as it is for writers to agree on the law which ought to prevail. The distinction is obviously impossible of application. See Hershey, Int. L., 1 n1.

[36] *Administrative:* International Administrative Law—a branch of international jurisprudence which is still in its infancy—has been tentatively defined as "that body of laws and regulations created by the action of international conferences or commissions which regulate the rela-

them. The only distinction is that some of them are strong and more generally observed than others. The writers who make these fanciful distinctions never attempted to apply them. After stating them, they proceeded with the subject as if these distinctions did not exist. A distinction which is never applied and has no material value may well be disregarded. Customary divisions of international law proceed upon an apprehended distinction in

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tions and activities of national and international agencies with respect to these material and intellectual interests which have received an authoritative universal organization." It relates to such matters as international communication by means of postal correspondence and telegraphy, international transportation, copyright, crime (e. g. the white slave traffic), sanitation. It is created by international congresses or conferences, and commissions, and is administered by international commissions and bureaus as well as by national agencies;" Hershey, *op. cit.* 5.

[37] *American and European:* It has been supposed by some writers that there is a difference between the international law in America and in Europe. No such distinction has in fact been pointed out, and it seems undesirable to perpetuate such an idea. The independent states of the world form one community; Hershey, *op. cit.* 1 n1.

[38] *Common:* Since there is no statutory international law, the word "common" is inadmissible as designating any part of that law, and can be used with accuracy only as applying to all international law. The word is useless in this connection in practice or in theory.

[39] *Conventional International Law:* Manning, Int. L. (2nd ed.) Amos. 86, 87. "The conventional law of nations results from the stipulations of treaties and consists of the rules of conduct agreed upon by the contracting parties;" 1 Halleck, Int. L. (4th ed.) 54, 55. Conventional law of nations is sometimes spoken of as the diplomatic branch of the law of nations; Twiss, L. of Nations, Peace (2nd ed.) 163; Wheaton, Elements (Dana's ed.) 15.

[40] *Customary:* "The customary law of nations is founded on the tacit or implied consent of nations as deduced from their intercourse with each other;" 1 Halleck, Int. L. (4th ed.) 55; Manning, Int. L. (2nd ed.) Amos. 78; 1 Oppenheim, Int. L. (2nd ed.) 17, 22; 1 Phillimore, Int. L. (3rd ed.) 38, *et seq.;* Twiss, L. of Nations, Peace (2nd ed.) 158, *et seq.;* Wheaton, Elements (Dana's ed.) 15.

[41] *Comity:* "International comity relates to those rules of courtesy, etiquette, or goodwill which are or should be observed by governments in their dealings with one another on the grounds of convenience, honor or reciprocity;" Hershey, Int. L. 3. "'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws;" Gray, J., in Hilton *v.* Guyot (1894), 159 U. S. 113 at 164. "Comity, as generally understood, is national politeness and kindness. But the term seems to embrace not only that kindness which emanates from friendly feeling, but also those tokens of respect which are due between nations on the ground of right;" Woolsey, Int. L. (6th ed.) 23. See 1 Oppenheim, Int. L. (2nd ed.) 25.

[42] *General and Particular:* This distinction attempts to differentiate the law generally obtaining among all states from the law applicable to a few particular states. No attempt appears to have been made to apply

the quality of the laws or their binding effect.[49] Some are supposed to be more binding than others. Since we have a spectacle of law in the making that is the development of rules of law, it is tempting to attempt to classify them according to the stage of their development, but in such a classification it is impossible to draw a clear cut line and make an accurate distinction between the various stages of the development, just as we cannot draw a line in the development of the chrysalis into the butterfly.

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the distinction and it may be dismissed as of no value. Hershey, Int. L. 1 nl. 1 Oppenheim, Int. L. (2nd ed.) 3.

[43] *Morality:* Hershey, Int. L. 2, says: "International morality deals with the principles which should govern international relations from the higher standpoint of conscience, justice or humanity." The notion of international morality is referred to by a number of the writers, but, as we have already pointed out, is entirely inadmissible in a legal treatise. Woolsey, Int. L. (6th ed.) 15.

[44] *Natural:* "The Natural Law of Nations is founded on the nature of independent states, as such, and is the result of the relations observed to exist in nature between nations as independent communities;" Twiss, L. of Nations, Peace (2nd ed.) 146. "Natural Law, according to Puffendorf, is that which is so exactly fitted to suit with the rational and social nature of man, that humankind cannot maintain an honest and peaceful fellowship without it;" Twiss, *op. cit.*, 146nl. "The natural law is, according to Woolsey, Int. L. (6th ed.) 11, the product of natural reason and ought, since men are alike in their sense of justice, to be everywhere substantially the same." See "History of the Law of Nature," Sir Frederick Pollock, 1 Columbia Law Rev., 11, *et seq.;* 2 Columbia Law Rev., 131, *et seq.* "Law of Nature as determining the objects of the Law of Nations;" 1 Lorimer, Inst. 19; Maine, Ancient Law (3rd Am. ed.) 70, *et seq.;* Manning, Int. L. (2nd ed.) Amos 66, et seq.; Twiss, *op. cit.* 146-155; Wheaton, Elements (Dana's ed.) 5, *et seq.;* Woolsey, Int. L. (6th ed.) 11, *et seq.*

[45] *Necessary:* "We call that the necessary Law of Nations which consists of the application of the Law of Nature to Nations." See Vattel, Chitty's Trans. Prelim., 7. Woolsey, Int. L. (6th ed.) 25, objects to Vattel's distinction of international law into natural or necessary and positive law. See 1 Halleck, Int. L. (4th ed.) 56; Twiss, L. of Nations, Peace (2nd ed.) 148; Wheaton, Elements (Dana's ed.) 14.

[46] *Positive:* "These three kinds of law of nations, the voluntary, the conventional and the customary, together constitute the positive law of nations;" Vattel, Chitty's Trans. Prelim., 27. "The positive law of nations, on the other hand, is based on the consent of nations and is the result of the relations instituted between them by their own free will;" Twiss, L. of Nations, Peace (2nd ed.) 146. See 1 Halleck, Int. L. (4th ed.) 53, *et seq.;* Woolsey, Int. L. (6th ed.) 3, *et seq.*

[47] *Universal:* Universal international law binding on all civilized states without exception; 1 Oppenheim, Int. L. (2nd ed.) 3. See Hershey, Int. L., 1 nl.

[48] *Voluntary:* According to Woolsey, Int. L. (6th ed.) 5, voluntary law seems to be such because it is so by consent of nations. See Twiss, L. of Nations, Peace (2nd ed.) 146, *et seq.;* Wheaton, Elements (Dana's ed.) 12, *et seq.*

[49] Halleck, Int. L. (4th ed.) 51, adopts division as follows: International Law:

The science of international law is the systematic study of the conduct of independent states, which is nothing more or less than the philosophy of international law. It is an attempt to arrange the jural conception of that conduct according to orderly and systematic arrangements, in which attempt the thinker may be influenced by the various notions of the external factors upon conduct which we have described. We may think of that conduct exclusively in terms of one factor and ignore the others. This is the attitude generally pursued by most of the writers on the subject. The invention of the word "science" is only another illustration of the fondness of the writers for multiplying words.[50] There is in every system of law a time when it begins to be consciously studied and written about and men begin to think what law is. In most systems of municipal law we can only imperfectly apprehend the exact point of the beginnings of such studying. In international law, however, we are able, with tolerable accuracy, to ascertain the beginning of the study of international law, or the beginning, as it is called, of the science

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(*a*) Natural Law of Nations.
Divine Law.
Application of the law of God to states.
(*b*) Positive Law of Nations.
Conventional Law.
Customary Law.
Normal rights and obligations of states:
Law of Peace
(1) Rights and obligations connected with Independence.
(2) Rights and obligations connected with Property.
(3) Rights and obligations connected with Jurisdiction.
(4) Rights and obligations connected with Equality.
(5) Rights and obligations connected with Diplomacy.
Abnormal rights and obligations of states:
Law of Belligerency
(1) Rights and obligations connected with Belligerency.
Law of Neutrality
(2) Rights and obligations connected with Neutrality.

Lawrence, Int. Law (5th ed.) 117. Woolsey, Int. L. (6th ed.) 26, divide the rights and obligations known to the science of international law into: (1) those which are deducible from natural *jus* which no action of sovereignty began or can terminate; (2) those deducible from the idea of a state: (3) those which are begun and can be ended by compact, express or tacit. He makes another division which closely follows the division of the three grounds or reasons for international rules, namely, *jus,* morality and convenience. He says the first class comprehends the rights and obligations which can be defined and enforced; the second, duties and moral claims which cannot be easily defined and need contact to establish them and the third, arrangements of a purely voluntary nature.

[50] "The Science of the Law of Nations may be accordingly defined to be the Science of the Rules which govern the International Life of States;" Twiss, L. of Nations, Peace (2nd ed.) 2, 152, 153; Walker, Science, Int. L., 91-111.

of international law.[51]. The systematic study of international law began probably as early as the sixteenth century, and the first recognized exponents of the learning appeared in the early part of the seventeenth century. This study was a study of the law as it applied to facts which had been unknown to Western Europe in fact and in theory for many centuries. These facts were the existence of independent states. These states arose as an economic development of the life of Europe entirely apart from any postulate of international law. The growth of the states created the conduct, of which it became necessary to form a jural conception, hence the states were antecedent to law, just as man is antecedent to the municipal law.

No adequate history of international law has been written in English. The subject requires a volume in itself, and such an historical discussion would be entirely out of proportion in a systematic treatise on international law as it exists at the present time. No such discussion will therefore be attempted here. Such a history will involve a history of international conduct, sometimes referred to as (A) a history of international relations; (B) a history of the philosophy of international law, which should trace the historical appearance and development of the various ideas which have influenced international law. The following general observations seem to be in point: The discussion will trace the historical development of international law during various epochs of the existence of independent state life, and point out the influence of various factors and different economic development. International commerce will, no doubt, be found to play a leading part in this development. A chapter should be added on the influence of international public opinion on international law, showing how the general ideas of the world at large at different times have influenced not only the conduct of independent states, but also the prevailing conceptions of what such conduct should be. With these few general observations, we shall leave the subject for the attention of some scholar better equipped for the task than ourselves.[52]

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[51] This fact should be kept in mind because many persons speak of the beginning of international law in the seventeenth century, and say that international law is scarcely three hundred years old. Such philosophers are, of course, inaccurate. It is the conscious study of international law which is only about three hundred years old. For reference to views of the principal writers see Hall, Int. Law (6th ed.) 2, n1.

[52] For discussions of the history of the science of the Law of Nations, see Hershey, Int. L. 56, 91; Manning, Int. L. (2nd ed.) Amos. 8, *et seq.*; 1 Oppenheim, Int. L. (2nd ed.) 83-104; Wilson & Tucker, Int L 6, *et*

Private international law or conflict of laws has to do with the circumstance that a member of one community or an interest of his comes within the political power of another community of which he is not a member. He may be affected by two different municipal laws. The question will arise—which of the two is to apply? There are two theories; one, that the municipal court, of its own judgment, chooses which law shall apply; the other, that there is a principle of law applicable in all municipal courts determining in any given case what choice shall be made. If the second theory is applied, private international law is a part of international law, because the municipal court in rendering the decision makes the conduct of the state conform to that determined by some international factor operating on all independent states.[53] There is a difference of opinion among the writers, and the subject will be omitted as it is usually discussed by itself, and its inclusion would destroy the proper proportion and balance of the work.[54]

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seq "Historical Development," Wilson & Tucker, *op. cit.* 12, *et seq.* "The History of International Relations During Antiquity and the Middle Ages," Amos. S. Hershey, 5 Amer. J. Int. L. 901 *et seq.* See Hershey, *op. cit.* 26-55. "History of International Law since the Peace of Westphalia," Amos S. Hershey, 6 Amer. J. Int. L. 30 *et seq.;* Hershey, *op. cit.* 56-91. For accounts of the history of international law and discussions of the various theories, see 1 Halleck, Int. L. (4th ed.) 1-49; 1 Oppenheim, *op. cit.* 45-104. "Ward Foundation and History of the Law of Nations in Europe to the Age of Grotius," Robert Ward. "History of International Relations before Grotius," Walker, Science, Int. L. 57-90; Twiss, L. of Nations, Peace (2nd ed.) 155 *et seq.;* Woolsey, Int. L. (6th ed.) 6-10. 1 Oppenheim, *op. cit.* 4, says that international law, in the meaning of the term as used in modern times, did not exist during antiquity and in the first part of the middle ages. What is the difference, however, between the modern meaning and the ancient? If he means that the science of international law did not exist, he is correct; if he does not mean this, it is difficult to tell what he does mean. He also says (Vol. 1, p. 4) that it is a product of modern civilization and is four hundred years old and the roots go far back into antiquity. "The International Law and Custom of Ancient Greece and Rome," Coleman Phillipson. See 11 Columbia Law Rev. 489.

[53] "The distinction, however, between the two branches of International Jurisprudence is extremely important. It is this: The *obligationes juris privati inter gentes* are not—as the *obligationes juris publici inter gentes* are—the result of legal necessity, but of social convenience, and they are called by the name of Comity—*comitas gentium.* 1 Phillimore, Int. L. (3rd ed.) 12, 13.

[54] Hall, Int. L. (6th ed.) 51, *et seq.;* Hershey, Int. L. 4, Lawrence, Int. L. (5th ed.) 5; 1 Oppenheim, Int. L. (2nd ed.) 4; 1 Westlake, Int. L. (2nd ed.) 246, *et seq.;* Woolsey, Int. L. (6th ed.) 102-109. "Grundzuge des Englisch-Amerikanischen Privat-und Prozessrechts, Besonders in Vergleiche mit den Systemen des Europaischen Kontinents," Arthur K. Kuhn. See 10 Amer. J. Int. Law, 674. "A Treatise on the Conflict of Laws," Vol. 1, Part 1, Joseph Henry Beale. See 10 Amer. J. Int. Law, 665.

The distinction between international law and municipal law is of importance.[55] International law, as appears from the definition, relates to the conduct of independent states and is without any superior political power to enforce it. Municipal law is law which is or may be enforced by the political power of the state, and therefore can only obtain within the jurisdiction of a state.[56] There are many analogies between the two systems of law, and many cases where the analogy breaks down. The use of analogy is always dangerous and subject to great caution. The same remark applies here.[57]

It is sometimes said that international law is a part of municipal law, [58] and a number of learned essays have been written in answer to the question—is international law a part of municipal law? Now, in what sense can it be said that any body of law is a part of another body of law? All law applying to the conduct of the same bodies or the same class of bodies, as, for instance, laws applying to Englishmen or Frenchmen, or English laws applying to infants, lunatics,[59] or laws applying to the conduct of persons with respect to property, are in each case bodies of law, that is, they are groups of legal principles distinguished from other legal principles by the difference in the objects to which they apply. It is perfectly obvious that the same rule of conduct may appear in two or more bodies of law, in other words the objects of different classes may happen to be regulated by the same rule of conduct. For instance, it may be a rule in France to the effect that a person is of legal age on reaching twenty-one, and the same may be the effect of the rule in England. It therefore so happens in such case that the same rule applies in each body of law. It would obviously in such case be improper to say as to either of these bodies that the rule of one was a part of the other. It may be, and sometimes has happened, that a rule of law has appeared in one body of law, and then subsequently, for

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[55] The term "municipal" is perhaps unfortunate, as this word is also applied to the law of municipalities. The term, however, is well fixed and understood in international usage, and too convenient to be discarded. With a little practice the learned reader will be able to divest the term of the more restricted meaning as relating to municipalities.

[56] "Municipal laws are rules of conduct observed by men or by men recognized as binding towards each other as members of the same state." Walker, Man. Int. L. 401.

[57] Manning, Int. L. (2nd ed.) Amos. 91.

[58] Snow Cases (1893), 1-4.

[59] As to municipal law producing an international effect, see Hall, Int. Law (6th ed.) 608 n1.

one reason or another, appeared in another body of law. In such case, it is said that the rule of law has been borrowed from or descended from the other body of law. The phrase is frequently used in the books applicable to such a state of affairs—that the foreign principle of law is part of the municipal law. Thus, we say of certain doctrines of the Roman law, of the law of merchant or the civil law, that in each case they are part of the common law of England. Now, this is obviously an inaccurate phrase describing the origin or place of the rule. The rule, itself, when applied by the court of the country, must be the rule of the law of that country and nothing else. A principle of law applied by an English court is, for the time being, to that extent, a rule of law of England, and while it may be conveniently distinguished from other principles of law because of its origin, it is, nevertheless, in spite of such loose phraseology, in fact nothing but a rule of law applied by an English court and therefore an English rule of law. It appears, therefore, that this phrase—that one law is part of another law—is inaccurate, and simply is used to describe an historical descent or borrowing; that, in point of fact, there can be no such thing as a part of one body of law being part of another body of law. Just as soon as the foreign rule of law is received into a state, it then becomes a part of the law of that state.

International law regulates the conduct of states, and municipal law that of individuals, consequently it cannot in any sense be accurately said that any rule of international law is ever a part of the municipal law. The true relation between the two bodies of law, it is submitted, is this: International law rests upon and regulates the conduct of independent states; municipal law rests upon the conduct of individuals within the state. For example, international law imposes on a state a duty of conduct with reference to the immunity of ambassadors, that is, the provision of international law is somewhat to this effect. No state shall interfere with the property or liberty of action or person of an ambassador while he is in the discharge of his official duties, nor shall any state permit any of its citizens to interfere with any such acts of an ambassador. The rule of international law cannot be addressed to the member of a state because he is not the subject of international law or within its purview. Accordingly, a state will prohibit any citizen from any such interference with an ambassador. The municipal law simply imposes

on a member a prohibition which the state is bound to impose because of the application of international law resting upon it.

Every independent state is bound by international law to provide certain rules of municipal law within its boundaries. It may in fact provide otherwise, and when it does so, to that extent it violates international law. Many instances have occurred where such a municipal law has been adopted. What becomes then of the proposition that international law is a part of municipal law? A court of justice in deciding a controversy to which there is no municipal law applicable, will presume that the state would have enacted the proper rule of international law, and, by not acting, left it be understood that the municipal common law was in accordance with the obligation imposed on the state by the provisions of international law.[60] So-called offenses against the law of nations, are, when accurately described, offenses against municipal law, which municipal law is enforced as a result of the international factors of conduct operating on the independent states.[61]

Several different titles have been used as a designation of the subject, as laws of war and laws of peace,[62] *droit des gens* or

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[60] This is the sense in which the language of the judges, quoted in Hershey, Int. L., 9-11, is to be understood. See Snow Cases, *supra*, footnote 58. International law does not have to be proved as a fact; 1 Moore, Dig. of Int. L., 11. 1 Oppenheim, Int. L. (2nd ed.) 9, says that the conception of municipal law is narrower than that of law pure and simple, by which he probably means law in the abstract. "As soon as a nation has assumed the obligations of international law they become a portion of the law of the land to govern the decisions of courts, the conduct of the rulers and that of the people. A nation is bound to protect this part of law by statute and penalty as much as that part which controls the jural relations or in other ways affects the actions of individuals;" Woolsey, Int. L. (6th ed.) 27. This conception, however, perpetuates the inaccurate phrase—international law a part of municipal law, and introduces the novel idea that a state can protect law by statute. What is this law thus protected by statute? He may mean (1) that the statute enacts international law, which it can never do; (2) that the statute enacts what was before a principle only of the common law, which is possible but beside the controversy, because international law could never be a principle of the common law. Wilson, Int. L., 15, says under the heading "Force of International Law," that international law is part of the municipal law of states, thus entirely missing the point as to force, if that term can be used, because the question is as to the binding force of international law on the states of the world.

[61] Offenses against the law of nations cognizable by judicial tribunals are, according to 1 Wildman, Int. L., 199, (1) Offenses against ambassadors; (2) Violations of safe conducts; (3) Libels against sovereign princes and eminent princes in foreign states; (4) Privacy.

[62] This was the title chosen by Grotius, and followed by many writers since. It, however, suggests an unsound distinction because war is a part of remedial international law and not the only part.

law of nations, a translation of *jus gentium, jus inter gentes,*[63] law among nations, international law,[64] interstate law,[65] superstate law, intrastate law. Of all these phrases, international law is the most used, and while none of them is accurate, this phrase sufficiently indicates the subject matter of the discussion either to the novice or the expert. It seems immaterial, as so many writers have done, to endeavor accurately to express in the title the precise nature of international law. It has been supposed by some that law of nations refers to the historical character or origin of law, and that international law applies to its jurisdiction and effect. This distinction is not settled in usage and may be ignored.[66] Since nations are not bodies whose conduct is within the scope of international law, the title is incorrect and it would be more accurate to say independent state law.[67]

SUMMARY

Independent states are, as has already been pointed out, living organisms having inherent powers, the exercise of which is unrestrained by any external superior political power. There are, however, certain external factors determining the conduct of an independent state, the operation of which results in a certain amount of international order, and in studying those factors and their operation, we start with the fundamental fact of inherent organic power of the state, and inquire what those restraints are, how they may be described, and their operation, which involves an inquiry into the definition and nature of international law.

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[63] Zouche, in 1650, first called the subject, "Jus Inter Gentes," but the phrase "law among nations" is due to the Chancellor d'Aguesseau; Thomas W. Balch, 64 Univ. of Pa. Law Rev. 113. See, however, Wheaton, Elements (Dana's ed.) 20; Woolsey, Int. L., (6th ed.) 10. "Jus Gentium and International Law," Gordon E. Sherman; 12 Amer. J. Int. Law 56.

[64] The term "international law" was invented by Jeremy Bentham in 1780; Wheaton, Elements (Dana's ed.) 20. "As, however, there cannot be a sovereign authority above the several sovereign states, the Law of Nations is a law between, not above, the several states, and is, therefore, since Bentham, also called 'International Law';" 1 Oppenheim, Int. L. (2nd ed.) 4. International Law has been objected to, Wheaton, *op. cit.* 16. Hershey, Int. L., 2, *et seq.*, uses the term "International Public Law," after using "International Law," thereby suggesting the title "International Private Law," or, as more commonly used, "Private International Law."

[65] Interstate law has been suggested, see Hershey, Int. L. 2, n2.

[66] As to title, see Hershey, Int. L. 2; Wheaton, Elements (Dana's ed.) 20, et seq.

[67] This obscurity referred to by Lawrence, Int. Law (5th ed.) 8.

A state has or may have interest just as an individual. The interests of a state are shown in the note.[68]

An independent state will be governed in its conduct by (a) self-interest, (b) inherent prejudice, (c) international public opinion, (d) custom, (e) pressure from one or more other states. The principles of ethics are excluded as they are so often overcome by the other factors that they are of little practical importance. These will be referred to as international factors of conduct, and they operate with varying force under different circumstances. The conduct of independent states as determined by these factors may be reduced to some semblance of order, just as in the case of conduct of individuals; and that conduct may be described in terms of the past, or present, or we may endeavor to predict what the conduct of an independent state will be under given circumstances at some definite time in the future. International conduct, under the influence of these various factors, tends to adjust itself along more or less determined lines, only these states are more self-conscious about the observance of any supposed rule of conduct which exists than is an individual in municipal life. The conception of that orderly conduct is a rule of independent state conduct.

The only redress which a state will have for damage to one of its interests is by setting in motion the external factors influencing independent state conduct which have already been referred to. The self-interest of a state will be an internal factor in conflict with and sometimes in harmony with the other external factors. Since the independent state can only obtain redress by setting in motion such factors, it follows that redress may only be had against the body subject to these factors, to wit, another in-

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[68] A state will have the following interests:

(*a*) An interest in itself, its territory, its activity, form of government and municipal law.

(*b*) An interest in its officials when they venture forth from its jurisdiction, which will be
- On the high sea,
- Within jurisdiction of another state,
- In jurisdiction of no state.

(*c*) An interest in its members beyond its borders, which will be
- On the high sea,
- Within jurisdiction of another state,
- In jurisdiction of no state.

(*d*) An interest in another state, which other state may be independent or dependent.

(*e*) An interest in the open sea and territory not subject to the jurisdiction of any other state.

(*f*) An interest in the maritime belt.

dependent state, and not therefore against an individual or a dependent state having no international function, or a subordinate division of a state, because all these bodies are subject to the political power of an independent state, and whatever action they may propose to take in the matter of such redress may be nullified by the act of the independent state on which they depend. An independent state, therefore, out of regard to its dignity, must deal with the principal in the first instance. International law is therefore the conception in terms of order of the conduct of independent states as determined by internal and external factors, which external factors exclude the forces of nature and superior political power. International law is a pure mental conception, just as law is. It can have no motive, purpose, object or subject. The external factors may exhibit such effects, but the conduct as determined by those factors can exist only in the imagination of the thinker, although conduct itself, in fact, in small segments, may appear to the observer. The discussion of whether international law has a legal nature is involved in the hopeless ambiguity with which the word "law" is used by the writers, and upon examination amounts to this: municipal law is enforced by the political power of the state; international law is not, therefore it has no legal nature. To which the answer is made as follows: in each case there are external factors determining conduct, and the absence of one factor in one case, which is present in the other, does not make the conception of the factors any less law. The controversy is as to the meaning of the word law and not over the real difference which exists. There can be no sanction to international law in the sense in which that word is used in the municipal law as describing a penalty fixed by the power of the state.

Since international law is a jural conception of the conduct of independent states, it follows that the conduct of independent states only is determined by the factors embraced in the definition. Dependent states, individuals and corporations are entirely outside the discussion.

It was formerly supposed that states outside the family were not bound by international law, and states, members of the family, generally assumed toward them the same arrogant attitude that the knights of chivalry did toward the meaner persons not belonging to their order, a state of mind not entirely absent from some individuals in modern times.

The principle underlying this attitude, however, was that

these barbarous states, because of their lack of civilization, commerce and sufficient self-interest, were not in a position to respond to the external factors determining state conduct to the same extent as were the independent states of the civilized world. and therefore there was a reason and necessity for considering them in a somewhat different way. This principle, however, did not excuse the Christian powers of Europe from the constant disregard of the territory and jurisdiction of these states which characterized the colonization movements of the 15th, 16th and 17th centuries.

There can be no subject or object of international law, but the international factors of conduct operate on independent states, which may therefore be subjects of the factors. An individual has no position in international law, as he is subject to the political power of his own state or some other state in which he is, and cannot, therefore, appear in international life unless he ventures forth as a pirate on the high sea. The external factor of superior political power shuts him off from the international world and determines his conduct in a manner which effectually excludes him from the consideration of the international lawyer. He is of importance only as a member of an independent state in which capacity alone he is considered.

The ambiguity of the word "right" has already been pointed out, and some of the senses in which the word is used referred to. The confusion caused by the use of the word in international law is intolerable, and it is little short of amazing that the able minds which have hitherto labored on the subject have been content to flounder so long in such an unspeakable quagmire.

A state has an interest in its territory, but the writers say—has a right to its territory. The interest is protected by the exernal factors in international life and by nothing else, and the principal factor in such a case is the inherent force and strength of the state in question. It does not help matters to call his interest a right, indeed it only draws attention away from the principal feature, which is that the interest of the state is unprotected by superior political power, whereas, the similar interest in the municipal law, to which the word "right" is applied is protected by such superior political power. The two instances, therefore, are in different categories. It seems inadmissible to apply the word "right" to each of them indiscriminately. In like manner, an independent state has a power, for instance, to make a treaty or send an envoy, a power exercised only by the inherent

force of the state, not by delegation of or grant from any other power. This is also called a right in the conventional discussion of international law. It is, however, a totally different thing from the interest mentioned above of a state in its territory, and yet the word "right" is applied to both without any apparent apprehension of the ambiguity involved. It appears from these instances and others referred to in the article that the word "right" is entirely too ambiguous for use in accurate thinking.

A state cannot be said to be criminally guilty of a violation of the law in the sense in which that word is used in the municipal law, as describing the case where violation of the law incurs the penalty fixed by the state. The word "criminal" as applied to state action, can only be used in a moral or ethical sense which, as we have pointed out, is entirely irrelevant in international law.

A state is responsible in so far as it is subject to the external factors determining the independent state conduct, and the writers on international law use the word generally as describing what a lawyer would call the liability of the state, that is, the fact that its conduct is so determined by the external factors. This meaning is somewhat strange to the English-speaking judge and lawyer, who use the word as referring to the personal capacity of an individual to comply with the demands of the external factors of political control. The notion of the responsibility of states is of little value and will be discarded. We may, perhaps, speak of the capacity of a state in so far as we distinguish those barbarous and uncivilized states which are not fit to participate in international life on the same terms as other states of superior civilization and wealth, and possibly also the notion of incapacity may refer to a state having a government which prevents it from such participation.

International law originated in the mind of the thinker, who first began to speculate on the nature of state conduct and ascertain how that conduct was determined. It seems clear that the conduct and the factors determining the conduct were in existence before the speculation began. Independent states adjusted their conduct to each other more or less unconsciously from necessity and from the pressure of the various factors without doubt for many thousands of years before any legal philosopher ever drew the breath of life. It is true that in the primeval life of man intercourse between tribes was rare and usually confined to armed conflict. It is clear, however, that even here a certain semblance of order was observed in the conduct of these tribes.

The source of international law, if it is, as we contend, a conception, must be in the mind of the person making the conception or in some outside facts from which the conception is drawn. The general statement is that the sources of international law consist of the decisions of prize courts, treaties, state acts, customs. The word "source" of course, means the origin of anything, as in the case of a stream, the place in the ground from which the stream springs; as in the case of a thought or conception, the mind of the person who originated the thought. Here, however, we may possibly say that if the conception or thought is based upon an observation of outside facts, that then those outside facts are in a measure the source of the conception, just as we speak of the sources of history, which are the muniments and historical documents contemporary to the events of which history is written. The historical book written by the author is entirely the product of his own mind, his mental conception of the facts which existed in the past, and that mental conception of those facts is derived from a perusal of certain documents which are referred to as the source of the history. The discussion over the source of international law, however, is of very little use because no distinction turns upon it, and it has no value in the practical application of international law.

Various kinds of international law have been distinguished. Some of the distinctions proceed upon the difference in the external factors involved determining the conduct, as international morality, international custom; others upon philosophical distinctions in the nature of international law itself, as natural, necessary, positive, which distinctions are also colored by the idea of the difference in external factors. These distinctions are of little value in theory and of no practical use whatsoever. The science of international law is merely a name for the formal method of studying the subject better described as the philosophy of international law.

No adequate history of international law has been written in English, and such a history requires separate and extended discussion.

Private international law is omitted, as there is some doubt whether it is a part of international law at all.

Municipal law is the law enforced by any political power within its jurisdiction. International law is the law enforced by international factors apart from political power. The distinction

between the two is clear and is generally accurately apprehended. It is said, however, that international law is a part of municipal law, and a considerable discussion in the books will be found on this subject as to which there is great obscurity of thought. It is perfectly obvious upon reflection that the two bodies of law are so entirely separate and distinct with respect to one of the principal factors determining the conduct in question that in no sense can it be said that international law is a part of municipal law, or vice versa. What this confusing discussion amounts to is this: the international factors operating on a state determine the conduct of that state, and the state whose conduct is so determined must in turn see that its individual members and subordinate officials comply in their conduct with that international obligation resting upon it. The state, therefore, must make its municipal law conform to the international obligation unless it desires to act contrary thereto. In many cases a state will fail or omit to make such municipal provision, and when a case comes before a court of that state, as in Great Britain and the United States of America, it will be decided that the state is in fact conforming to the international obligation, and the judges will say loosely that the international law is a part of the municipal law, by which they mean, more accurately expressed, that the presumption is that the municipal law of the state conforms to the international obligation until it appears to the contrary by express enactment of the appropriate organ of the state.

Various titles have from time to time been used for the subject, the distinction between which is entirely immaterial for any purpose. The only necessity is to have a title which will be clearly understood by all as referring to the particular subject in hand. The phrase "international law" best meets this requirement, although the reference to nationality by the term "international" is inaccurate.

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